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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1366

ANGELO MARINO, THOMAS BASALARI
and ADAM NICHOLAS,
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioners in the above-entitled case pray for a writ of certiorari to review orders of the Supreme Court of the State of New York, Appellate Division, First Department, entered December 2, 1971, unanimously affirming judgments of the Supreme Court, Bronx County, rendered February 5, 1971, convicting them, after trial by jury, of the crime of Official Misconduct [New York Penal Law, §195.00], and sentencing them to definite terms of one year. They are presently at liberty on bail pending determination of this application.

Opinion Below

The Appellate Division of the Supreme Court affirmed the convictions without opinion [38 App. Div. 2d 688, 689].

Jurisdiction

The orders of the Appellate Division were entered on December 2, 1971. An application for leave to appeal to the Court of Appeals of the State of New York was denied by Judge Charles D. Breitel on January 26, 1972. This Court's jurisdiction is evoked under 28 U.S.C. §1257(3).

Questions Presented

In our view no substantial federal questions have been presented in this case. Nevertheless, we shall list the claims petitioners have set forth:

1. Whether proof at trial that petitioners, police officers at the time of indictment, had failed to file police reports and make entries in their memorandum books violated their privilege against self-incrimination under the Fifth and Fourteenth Amendments.

2. Whether the count of the indictment under which petitioners were convicted was so vague as to deprive them of due process under the Sixth and Fourteenth Amendments.

Statement of the Case

Although it is contended that the questions raised now were passed upon by the Appellate Division, which affirmed without opinion, petitioners have failed to seek amendment of the remittitur to reflect that the state courts passed upon constitutional issues.

The seven-count indictment herein charged petitioners, detectives of the New York City Police Department, with taking certain property from Barbara Kimble and John Garland, and it rested upon three theories: (1) larceny—that Kimble and Garland were the victims of extortion or theft (counts one and five); (2) bribery—that Kimble and Garland had a "meeting of the minds" with and consequently bribed the petitioners (counts three, four and six); and (3) official misconduct—that petitioners took property without either victimization or agreement (count seven). In addition, the petitioners were accused of burglary (count two).

Petitioners' convictions were under count seven of the indictment which accused them of the crime of Official Misconduct* committed as follows:

> "The said defendants, acting in concert with each other, and another person, in the County of Bronx, on

* Section 195.00 of the New York Penal Law provides in part: "A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or to deprive another person of a benefit:

* * *

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office."

or about and between the 14th day of November, 1969, and the 24th day of November, 1969, while employed as public servants, to wit, detectives in the Police Department of the City of New York, with intent to obtain a benefit therefrom, to wit, approximately $1,300.00 United States Currency, a quantity of narcotic drugs, a sawed off shot gun, and other personal property from Barbara Kimble and John Garland, unlawfully refrained from performing a duty which was imposed upon them by law and which was clearly inherent in the nature of their offices."

Following the presentation of evidence by both sides, the People conceded the absence of an agreement, the Court dismissed the burglary count, and the jury rejected the larceny allegations. Thus, the petitioners convictions rest entirely upon the third theory of law expressed in the indictment, to wit, official misconduct.

At trial it was undisputed that the petitioners were present in the Kimble-Garland apartment on November 17 or 18, 1969, in their official capacity as detectives. Testimony from both sides showed that they had conducted a search of the premises at 1483 Hoe Avenue with Barbara Kimble, John Garland and various other people present. In addition, it was agreed by all concerned that Detective Michael Ryan joined the petitioners in apartment 11. Finally, it was uncontested that no arrests were made and that no subsequent police action was taken by the detectives as a result of their visit to that address. The People's witnesses testified that the petitioners found and confiscated narcotics, a sawed-off shotgun, money and stolen property, including jewels.

One of the People's witnesses—Captain Hanley—testified that he searched the records of the New York City Police Department for a report on the Hoe Avenue incident, but found no indication that a report had been filed thereon by anyone. Counsel interposed only a general exception which was overruled (874-876).* When Hanley further testified that Police Department Rules require the filing of such reports (877) and that he found nothing filed by petitioners (880), no defense objection was placed on the record. Moreover, petitioners only objected that Hanley was "referring to contents of something that's not in evidence" when he testified that police officers are required to keep memorandum books, which in the case of petitioners, contained no mention of their visit to apartment 11 at 1483 Hoe Avenue (880-881). Finally, that no D.D. 62 forms could be found was admitted without protest (882).**

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* References are to the Stenographic Minutes of Trial.

** What rules are involved and what they entail are not included in the record. Apparently, petitioners are referring to the Rules and Procedures of the New York City Police Department. The texts of various regulations read in relevant part as follows:

> *Rule 21/1.0*—"Charges in writing may be preferred against a member of the department alleged to have violated these Rules and Procedures."
>
> *Rule 3/26.0*—"The department furnishes U.F. 16 (Memorandum Pad) * * * for making reports and other notes. Members of the force shall preserve their completed memorandum pads and produce them as required by competent authority."
>
> *Rule 7/4.0*—"Detectives shall maintain on U.F. 16 (Memorandum Pad) a daily chronological record of duty performed by them."

Three police forms appear in the testimony at trial. The U.F. 61 is a complaint report which is prepared whenever criminal activity is reported or observed. The D.D. 5 is a supplementary complaint report containing information as to any action taken or news received after completion of the U.F. 61. The D.D. 62 is a chronological listing of cases kept in each detective squad office and containing, in order of receipt, each complaint, investigation or arrest made by a member of the Detective Division.

All three petitioners testified that petitioner Basalari received a tip from an informant regarding the sale of narcotics and the presence of stolen property, and that pursuant thereto they proceeded to 1483 Hoe Avenue. On cross-examination petitioner Nicholas was asked whether any Police Department records or reports relative to his actions in the Kimble apartment existed, and he answered, "No, to the best of my knowledge, no" (1101). No exception to the question was entered. Later, the People offered his memo book into evidence and defense counsel objected, noting that "there's no entry in there about November 17th. It's a violation of a constitutional right." At that point, however, the offer was withdrawn and only those pages concerning November 17th were introduced into evidence. No further objection was voiced (1112-1113). Subsequently, Basalari, too, was interrogated about his filing of reports, making of memo book entries and accounting to superior officers, whereupon objections were made but no grounds were given therefor (1326-1327). Petitioner Marino answered that no U.F. 61 or D.D. 5 forms regarding his activities were on file without an objection being taken (1408-1409).

Petitioners did not demur to the indictment [former New York Code Crim. Proc., §323]. In their 57-page brief to the Appellate Division, their complaint was addressed to the sufficiency of the proof at trial, rather than the adequacy of the indictment. The only mentioning of a possible shortcoming in the indictment was the following incomplete sentence:

> "That the indictment in regard to the seventh count violated the Sixth Amendment to the federal constitu-

tion that requires that an accused in a criminal case be informed of the nature and cause of the accusation. See also Russell v. U.S. 749; U.S. v. Lamont 18 FRD 27, 31, aff'd 236 F (2) 812'' (p. 48).

Although the Appellate Division affirmed the convictions without opinion, petitioners have not sought to amend the remittitur.

ARGUMENT

POINT ONE

No federal questions were preserved for this Court's review.

Reflective of petitioners' awareness that the issues raised herein were not saved for this Court's consideration is their insistence upon coming into this Court on a clouded record. The decision not to amend the remittitur makes the basis for the state court affirmance without opinion unclear and necessitates the dismissal of the instant petition [see Stern and Gressman, *Supreme Court Practice,* Sec. 3.29, pp. 128-131 (4th ed. 1969)].

Furthermore, we submit that both points contested by petitioners were decided on independent state grounds. In each instance the Appellate Division could have resolved the problem procedurally without reaching the merits thereof.

With respect to the self-incrimination plaint, we have summarized the proceedings surrounding the introduction of the controversial evidence in our Statement of the Case,

supra. A general objection without specific mention of any alleged infirmity is insufficient to save an exception on appeal in New York, unless the evidence was not admissible for any purpose and no corrective action could have cured the inadmissibility [*People* v. *Vidal,* 26 N.Y.2d 249 (1970); *People* v. *Murphy,* 135 N.Y. 450 (1892); Prince, *Richardson on Evidence,* §543 (9th ed., 1964)] or a request to charge was made that the failure to file reports is not to be considered by the jury [New York Crim. Proc. Law, §470.05(2); former New York Code Crim. Proc., §420-a].

In addition, the Appellate Division may have found Captain Hanley's testimony innocuous. The petitioners admitted on the witness stand that no memorandum book entries were made and no reports were filed, and, of course, their credibility could be thus tested by inquiry in that regard. No claim has been advanced that they were forced to testify.

Likewise, the Appellate Division could have found that petitioners' failure to demur to the indictment precluded its determination of the vagueness of the indictment issue [former New York Code Crim. Proc., §331], that is, if they could even detect that point, which we neither discerned nor argued in our brief to that Court. As we indicated above, in our view petitioners never raised it until they filed the instant petition seeking certiorari.

In conclusion, it appears that the New York courts have not passed on either question upon which review is sought.

POINT TWO

No constitutional issue has been presented.

As previously stated, in our view, petitioners' claims must be disposed of without reaching a determination on the merits. Nevertheless, we shall treat their arguments in sequence.

A. Concerning elicitation of testimony regarding noncompliance with Police Department rules

Petitioners claim that the introduction of testimony regarding their failure to keep records and file reports infringed upon their privilege against self-incrimination.

In our view the Fifth and Fourteenth Amendments do not apply to the case at bar. The policeman is only required to report a lawful activity. Had petitioners complied with the rule, they would never have been harmed by it. At trial they admitted being present in the Kimble apartment. Thus, we cannot see how their constitutional rights were violated by a regulation that they put down in their memorandum book what they would swear to later before a jury.

No exertion of any force upon a police officer to incriminate himself exists. In fact, the rules do not envision that anyone will incriminate himself and nothing inherently inculpatory can be found therein. The policeman does not have to admit an action which may hurt him. Here, petitioners' decision not to perform an affirmative act appears as an equivocal piece of evidence which may

constitute consciousness of guilt. But, that happenstance does not invalidate the regulation. In other situations, the courts have not automatically termed a disclosure requirement potentially violative of constitutional rights and applied a balancing test, as petitioners would have us employ [*Toussie* v. *United States,* 397 U.S. 112, 133 (1970) (dissenting opinion), *rev'g on other grounds,* 410 F.2d 1156, 1160 (2d Cir. 1969) (men must register for draft late in spite of danger of prosecution for not registering on time); *United States* v. *Silverman,* 449 F.2d 1341, 1345-1346 (2d Cir. 1971), *cert. den.* —— U.S. ——, 40 U.S.L.W. 3399 (Feb. 22, 1972) (attorney required to file closing statements in contingent fee cases used by I.R.S. to convict for attempted income tax evasion); *United States* v. *Reiff,* 435 F.2d 257 (7th Cir. 1970), *cert. den.* 401 U.S. 938 (1971) (physician must keep records as to disposition of certain drugs); *United States* v. *Minor,* 398 F.2d 511, 513-514 (2d Cir. 1968), *aff'd* 396 U.S. 87 (1969) (distributor of narcotic drugs cannot sell without written order form supplied by buyer to whom privilege is personal); *Clayton* v. *New Orleans Police Department,* 236 So. 2d 548, 551 (Ct. App.), *cert. den.* 256 La. 867, 239 So. 2d 363 (1970) (police officers who were possible suspects in homicide required to take polygraph tests); *Matter of Krolick* v. *Lowery,* 32 App. Div. 2d 317, 319 (1st Dept. 1969), *aff'd* 26 N.Y.2d 723, *cert. den.* 397 U.S. 1075 (1970) (firemen required to take alcohol content blood test); *State* v. *Knowles,* 79 Wash. 2d 835, 490 P.2d 113, 117-118 (1971) (welfare recipient required to file truthful reports in order to obtain benefits)].

Certainly, the privilege against self-incrimination does not apply to our set of facts, too, for the nature of the

act is not the relevant criterion. It is merely fortuitous that an act of "silence" is involved. The reporting requirement is indistinguishable from other job requisites, such as signing in and out of the precinct, giving a ticket for a traffic infraction, and wearing a uniform while on duty.

In any event, considering the public nature of the reports and memorandum pads and the underlying purpose of the rules calling for them, that is, to maintain the efficient running of a large bureaucratic organization by making possible both intelligent internal communications and the refreshing of the officer's recollection at a later date, such as at a trial, the privilege asserted does not apply to the situation at hand under the "required records" doctrine [*Shapiro* v. *United States,* 335 U.S. 1 (1948)]. In fact, petitioners apparently do not seek to strike down any of these requirements—no doubt recognizing their propriety—but, instead, merely seek to impose a use restriction. We submit that this concession on their part resolves any possible constitutional problem, since petitioners offer neither reason nor authority for such a proposition. *Arguendo,* were the "balancing test" applicable here, no question would arise that the rules must be sustained.

The application of a "balancing test" to the public need concerned and the potential threats to the constitutional protection claimed [*cf. California* v. *Byers,* 402 U.S. 424 (1971); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Wiemann* v. *Updegraff,* 344 U.S. 183 (1952)] shows that no federal question exists.

Here, the need is so great that it has not even been disputed, as we noted above.

The situation closely parallels the circumstances in *California* v. *Byers, supra*—a case holding a disclosure requirement did not infringe upon the self-incrimination privilege —and has none of the fatal characteristics present in *Marchetti* v. *United States* [390 U.S. 39 (1968)], *Grosso* v. *United States* [390 U.S. 62 (1968)] and *Haynes* v. *United States* [390 U.S. 85 (1968)]—decisions condemning reporting mandates as violative of the Fifth Amendment—in that the activity regulated is lawful [*United States* v. *Sullivan,* 274 U.S. 259 (1927)], the rules' purposes are noncriminal with self-reporting essential to their fulfillment [*Leary* v. *United States,* 395 U.S. 6 (1969)], they are not "directed at a highly selective group inherently suspect of criminal activities" [*Albertson* v. *SACB,* 382 U.S. 70, 79 (1965)], and they do not expose police officers to a " 'real and appreciable' " risk of self-incrimination [*Leary* v. *United States, supra* at 16].

In the instant case, we have a police department-police officer relationship with a condition, made prior to hiring, that the officer file reports of his daily on-the-job activities. "There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement" [*California* v. *Byers, supra* at 434] or to be policemen [*McAuliffe* v. *New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892)]. We see no constitutional dilemma, especially where the prosecution is not for the failure to disclose (see Point Two B, *infra*) and no particular group of officers is singled out. "The mere possibility of incrimination is insufficient to defeat

the strong policies in favor of a disclosure called for by statutes like the one challenged here" [*California* v. *Byers, supra* at 428].

Finally, by taking the witness stand, all the petitioners waived their privilege against self-incrimination and offset any possibility of resulting prejudice from the testimony of Captain Hanley. When testifying, they cannot select the testimony which they want the jury to hear.

B. Concerning the form of the indictment

Petitioners contend—for the first time in the history of this case—that the seventh count of the indictment—as distinguished from the formulation of Penal Law, §195.00—was impermissibly vague for its failure to specify the duty omitted. We know of no rule or reason raising vague pleading to the status of a constitutional issue. The fault, if any, is poor draftsmanship of the relevant count. New York has a procedural remedy therefor, but petitioners chose not to exercise it by declining to demur. Since no claim has been advanced that the statute is unconstitutional, the availability of a state remedy leaves no issue for this Court to review.

As a practical matter the petitioners received due notice of the charge, that is, that the duty not performed was arrest. Incidentally, New York case law makes the failure to arrest a violation of the statute [*People* v. *Glennon,* 175 N.Y. 45 (1903); *People* v. *Davies,* 26 App. Div. 2d 573 (N.Y. 2d Dept. 1966); *People* v. *Heckt,* 62 Misc. 2d 287 (N.Y. Erie Cty. Ct. 1969); *People* v. *Thompson,* 58 Misc. 2d 511 (N.Y.

Saratoga Cty. Ct. 1969)]. On this record the claim that petitioners were misled as to the duty not performed must be rejected as specious, as we shall illustrate by briefly examining the indictment as a whole and reviewing the actions taken in the trial court.

Count three of the indictment, in charging petitioners with bribe receiving, alleged that they acted "upon an agreement and understanding that their opinion, judgment, action, decision, and exercise of discretion as public servants would thereby be influenced." What could three detectives improperly do to help two addicts found in possession of narcotics other than to decline to arrest them? Similarly, counts one, four and six lead to the conclusion that petitioners were remiss for their omission of arrest, so that the indictment, when read as a whole, sufficiently informed petitioners as to the nature of the charges against them.

While an indictment must include "[a] plain and concise statement of the act constituting the crime" [former New York Code Crim. Proc., §275], the instrument is not insufficient where no prejudice to a defendant has resulted from a defect [*id.*, §285]. The duty of a police officer to make an arrest when he sees a crime being committed is such an obvious one that all parties and the Court seem to have treated the refraining from arresting as the nonfeasance under consideration. That knowledge explains why no complaint was made until petitioners reached the appellate level. In fact, the indictment was not even under attack in the Appellate Division.

Moreover, it should be noted that the prosecutor in his summation noted that petitioners "are not on trial for any

violations of any rules and regulations of the Police Department" (1570), no evidence of any duty to turn over the narcotics seized was adduced, and no request to charge was offered at trial. Furthermore, even defense counsel stated on the record, at one point, "They're not on trial, your Honor, for any violations of rules or procedures within the Police Department" (82). Finally, in instructing the jury on the elements of extortion, the trial judge charged that the fear involved was that petitioners would be placed under arrest (1694, 1697).

It is difficult to comprehend how petitioners can seriously suggest that they were uninformed as to the nature of the charges against them. Thus, we appear to be confronted with an ingenious afterthought which might have given the trial court pause had petitioners entered a timely demurrer.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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